4-3-2007

No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

WYOMING'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATEMENT OF THE CASE

The State of Wyoming ("Wyoming") submits this brief in opposition to the State of Montana's ("Montana") Motion for Leave to File Bill of Complaint. Montana's claims lack sufficient seriousness or dignity to justify this Court's exercise of its original jurisdiction. Montana's allegations that Wyoming has developed groundwater, sprinkler irrigation systems, new reservoirs, and new irrigated lands since 1950 are allegations of conduct that does not violate the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (Appendix A to Montana's Proposed Bill of Complaint) ("the Compact," and cited as "YRC"). Montana also fails to adequately allege that it has suffered injury caused by any of this post-1950 development in Wyoming.

Wyoming also asserts that the Yellowstone River Compact Commission ("Compact Commission") is an adequate alternative forum to which this Court should refer Montana for fact development. Wyoming has shared with Montana much of its data on its water use in the Tongue and Powder River drainages, and will continue to do so. The Compact Commission has the authority to ensure full disclosure. Had Montana gathered the facts before prematurely filing this suit, it would have discov ered that it has no factual or legal basis for its claims.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED

A. Introduction

The Yellowstone River Compact became effective on October 30, 1951 with Congress's consent. YRC, *supra*, 63

Stat. 663. Montana bases its claims on the practices of Wyoming water users within the drainages of the Tongue and Powder Rivers, two of the four "Interstate Tributaries" to the Yellowstone River that are governed by the Compact. (Proposed Bill of Complaint 1-5), YRC art. II, § F. Montana has made no allegations regarding any Compact violations on the other two Interstate Tributaries, the Clark's Fork of the Yellowstone River and the Big Horn River. Montana's legal theories are based on Article V of the Compact, which creates a three-tiered water allocation scheme.

The first tier is found in Section A of Article V, where the states agreed that surface water rights to water from Yellowstone River System (which includes the Tongue and Powder and their tributaries), would continue to be enjoyed under each state's water laws as those laws existed as of January 1, 1950. Wyoming agrees with Montana that these pre-1950 rights are to be administered within each state based only on intra-state prior appropriation. Montana's Brief in Support of Motion for Leave to File Bill of Complaint 19 ("Mont. Br."). Therefore, this Court need not consider the Compact's first tier allocation under Section A of Article V.

The second and third tiers of the Compact's water allocation scheme between Montana and Wyoming are combined in Section B of Article V. The second tier is in the first clause of Section B, and it involves supplemental supply water rights. These are post-1950 water rights through which irrigators in Montana and Wyoming may divert new water to supplement the water that they

already apply to their lands through pre-1950 original water rights.[1]

Montana contends that supplemental rights in Montana and Wyoming are to be allocated between users in the two states based on the users' seniority of use applied across the state line. (Mont. Br. 13) While Wyoming disagrees with Montana on this theoretical issue, the issue is not ripe for determination in this case because Montana never alleges in its proposed Bill of Complaint or in its brief that its users with supplemental rights have actually suffered any injury based on seniority issues. In fact, Montana has not even specifically alleged that it has any users with post-1950 supplemental rights. Therefore, Wyoming will not further address in this brief whether the Compact created an interstate priority system for supplemental rights in the two states.

The issues that this Court should analyze for purposes of Montana's motion arise from the second clause of Section B, and Section C of Article V, which together establish the third tier of the Compact's water allocation scheme. These clauses apportion between the states water in the Interstate Tributaries on any particular date in excess of pre-1950 rights. Section B provides that such divertable surface flows may be diverted into storage or directly onto new lands that were opened to irrigation

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[1] Montana has no statute establishing how supplemental water rights are acquired in that state. However, Wyoming has recognized supplemental water supply rights since early in the last century, and the Wyoming Legislature passed a supplemental supply statute in 1965. Act of March 1, 1965, ch. 136, 1965 Wyo. Sess. Laws 372 (codified as WYO. STAT. § 41-3-113 (2005)).

after 1950 based on percentages.[2] On the Tongue, 60% of divertible flows are allocated to Montana and 40% to Wyoming, and on the combined Powder and Little Powder, 58% of the divertible flows are allocated to Montana and 42% to Wyoming.

Section C of Article V establishes a formula to determine whether each state remains within its percentage allocation on a particular date. The formula compares cumulative diversions in each state during the relevant water year (which begins on October 1) through the date in question, against a total divertible flow for the water year through the date in question. That total cumulative annual divertible flow consists of water that users in both states diverted from the relevant river, the net increase in the amount of water stored in reservoirs in both states, and the amount of water that flowed past the "point of measurement" near the end of the relevant river. YRC art. V, § C.1.-4.

In summary, Montana's case centers on the third tier of the Compact's allocation scheme, which specifically allows Montana and Wyoming water users with post-1950 water rights to divert and store available divertible flows as long as they do so within the bounds of Compact percentages.

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[2] Irrigators along the Tongue, Powder, and Little Powder typically make their diversions through headgates where canals and ditches intersect with the river, and through electric pumps in the river channels themselves.

B. Montana has Failed to Gather and Allege Adequate Facts to Support its Claims

In order to state a claim that Wyoming has violated the Compact's third tier allocation scheme with its post-1950 diversions, Montana must allege: (1) how those diversions would theoretically violate the Compact, (2) that such diversions have actually occurred on the Tongue, Powder and Little Powder Rivers, and (3) that such diversions have damaged Montana users. Montana has failed to allege such facts, and its failure should not be excused.

1. Wyoming Water Rights are in the Public Record and have been Readily Available to Montana

When the Yellowstone River Compact was adopted in 1951, both Wyoming and Montana were prior appropriation states, relying on the general principle of first in time, first in right, and they remain so today. There were some differences between the states' systems, however. In Montana, most water rights are "use rights" that users have perfected by simply putting water to use, without any public record notices or permits. *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 951 (Mont. 1985). To correct this ad hoc system, the Montana Legislature passed the Montana Water Use Act of 1973, establishing water courts to conduct general adjudications of water rights on Montana's rivers. *See Pettibone*, 702 P.2d at 951 (discussing history of Montana water law). A Montana water court has completed an adjudication of rights on the Powder under the 1973 Act, and a general adjudication of the Tongue is underway in Montana. Until the general adjudication is completed on the Tongue, Montana will not be in a

position to prove for purposes of Compact allocations which of its diversions are for pre-1950 use rights as compared to post-1950 rights.

In contrast to Montana's system, Wyoming irrigators have always had to obtain a permit from the state engineer to put water from a particular source to beneficial use on specific land. WYO. STAT. § 41-4-501 (2006). The user would then divert water from that source, in the amount, through the means, and onto the lands, as set forth in the permit. After making his diversions, and putting the water to beneficial use, the permittee is compelled by statute to confirm his water right through a formal adjudication of his right before the Wyoming Board of Control.[1] WYO. STAT. §§ 41-4-511, 41-4-201 (2006); *see* M. Squillace, *A Critical Look at Wyoming Water Law*, 24 Land & Water L. Rev. 307, 309-310, 321-323 (1989). Wyoming's system was in place long before January 1, 1950, and continues today with little change. *Compare* Act of December 22, 1890, ch. 8, 1890-1891 Wyo. Sess. Laws 100-101 *with* WYO. STAT. § 41-4-511 (2006).

Under Wyoming's permitting system, Wyoming water rights documentation has for many years been publicly available at the Wyoming State Engineer's office, and since October of 2003 has been published on its website. Appendix B, Affidavit of Patrick T. Tyrrell, ¶ 6 ("App. B"). If Montana had so desired, it could have used this public documentation as a springboard from which to investigate

[1] The Wyoming Board of Control is comprised of the four division superintendents from each of Wyoming's four water divisions. WYO. CONST. art. 8, §§ 2, 4. The Wyoming State Engineer, who is the official with constitutional authority to generally supervise the waters of the state, presides at Board meetings. *Id.* art. 8, §§ 2, 5.

Wyoming's water use in drought years. Montana apparently failed to make such an investigation because it has failed to allege facts supporting its claim that Wyoming diversions have violated the Compact and damaged Montana. Instead, it has alleged only the potential that Wyoming diversions have done so. (Mont. Br. 16)

2. Wyoming and the Compact Commission have given Montana Ample Opportunity to Investigate its Claims

In the 56 years between the adoption of the Compact and Montana's filing in this Court, Montana and Wyoming water officials have shared their interpretations of various Compact provisions. Also, at annual Compact Commission meetings, and at meetings of the commission's technical committee, the states have shared data regarding water use in the four Interstate Tributaries covered by the Compact.

On May 18 of the drought year of 2004, Montana's water administrator Jack Stults complained in writing to Wyoming about lack of water in the Tongue and Powder for diversion by Montana's pre-1950 users.[4] App. B ¶ 7. Mr. Stults wrote a similar letter two years later, on July 18, 2006, when drought again plagued the Tongue and Powder Basins. *Id.* ¶ 12. Montana implies that when Wyoming responded to these written complaints, it simply took a hard line position on various Compact issues and that was

[4] Mr. Stults stated in his 2004 letter that Wyoming should cut off its pre-1950 water rights with priority dates junior to the priority dates of pre-1950 Montana water rights that were not being satisfied. As noted above, Montana has abandoned this argument for an interstate priority scheme under Article V, Section A of the Compact. (Mont. Br. 19)

that. On the contrary, after noting that drought was hurting very senior Wyoming irrigators as well as Montana irrigators, Wyoming State Engineer Tyrrell made detailed, timely responses in writing in both 2004 and 2006 in which he offered to share information and meet with Montana officials. *See* Appendices C and D. As a result, Montana and Wyoming officials met outside the auspices of the Yellowstone River Compact Commission and both states submitted information requests to each other. App. B ¶ 8.

In June of 2004, when Montana and Wyoming were fully engaged in these drought-induced discussions, the Wyoming State Engineer actually forwarded a copy of Wyoming's tabulation book to Montana's representatives. App. B ¶ 8. It contained a listing of all Wyoming water rights on the Tongue and Powder Rivers and their tributaries. In 2004 and 2005, Wyoming also gave Montana a copy of the hydrographer's annual reports that detailed the available actual Wyoming storage and use in the Tongue and Powder during those water years.[5] *Id.* ¶ 10. Also, in both 2004 and 2005, Mr. Tyrrell and his staff took the initiative to set up several work sessions of the Yellowstone Compact Commission Technical Committee so that Montana personnel could review Wyoming water rights and Wyoming's on-the-ground regulation of the Tongue River. App. B ¶¶ 8-10. Unfortunately, Montana cancelled both of the workshops. *Id.* ¶¶ 8, 10.

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[5] A hydrographer is a Wyoming state employee attached to a water division and under a division superintendent's supervision. The hydrographer travels his assigned drainages and keeps track of water use in many areas through documented measurements and estimates.

Montana fails to mention in its brief that, as a result of the 2004 correspondence and meetings that did take place, the states agreed to pursue funding for a joint study of the water rights and water uses on the Tongue River. The 2006 Wyoming Legislature appropriated $100,000.00 for the joint study, but Montana has never reciprocated. *Id.* ¶ 11. Montana has been aware for the last several years that Wyoming was prepared to fund the joint study if Montana would step up to the plate. Mr. Tyrrell reminded Montana of the funding in his letter of August 9, 2006, in which he responded to Mr. Stults's letter of July 28, 2006. App. D at D-3. Also, Montana's legislature considered appropriating its $100,000 share for the joint study as late as February of 2007, but instead turned its attention to funding this case.

In his August 9, 2006 letter, Mr. Tyrrell again offered to meet with Montana representatives to go over facts and issues. App. D at D-3. Instead of taking him up on this offer, Montana waited until just before the Yellowstone River Compact Commission meeting on December 6, 2006, and circulated a resolution for consideration by the commission. (App. B to Mont. Br.) In paragraphs 3 and 4 of that resolution, Montana essentially asked Wyoming to agree to novel interpretations of the Compact which would have rewritten it as a non-depletion compact, and a groundwater compact. *Id.* at A-4 through A-5. The resolution never came to a vote for lack of a second. The resolution was symptomatic of Montana's efforts over the last several years to bring its Compact interpretation issues before the commission, while ignoring the commission's true jurisdiction under the Compact to engage in "the collection, correlation, and presentation of factual data. . . ." YRC art. III. § C.

In summary, when droughts in 2004 and 2006 have curtailed irrigation on the Tongue and Powder in both states to early pre-1950 rights, Wyoming has shared its superior information on Wyoming water rights and uses and has even offered to show Montana its actual uses on the ground. Montana's lack of due diligence in working with Wyoming or the Compact Commission Technical Committee to develop facts about Wyoming's practices has resulted in Montana's failure to make critical factual allegations in its proposed Bill of Complaint. Significantly, Montana has failed to allege with any particularity what, if any, post-1950 Wyoming water rights on the rivers have been satisfied at the same time that Montana pre-1950 users were dry during the recent drought years of 2004 and 2006. Instead, when complaining about Wyoming post-1950 water development in its brief, Montana vaguely states that "[a]ll of these developments since the adoption of the Compact have the potential, in some cases the strong potential, to increase the consumption of water in Wyoming." (Mont. Br. 16) Potentials, and even strong potentials, are not the same as actual allegations of causation or damages that demonstrate serious or dignified claims.

C. A Review of Wyoming's Actual Post-1950 Water Rights Developed on the Tongue and Powder Rivers Undercuts Montana's Claims

Montana has adequately summarized the overall geography of the Tongue and Powder Rivers in its brief. (Mont. Br. 3-4) Montana has not, however, adequately recited Wyoming's diversions under its post-1950 water rights on these rivers. These diversions are important, because Montana bases its case on the third tier of the

Compact's allocation scheme and can only show that Wyoming violated that third tier through calculations that employ Wyoming's actual diversions from the main stems of these rivers.

The majority of the Wyoming water rights for diversions from the Tongue are pre-1950 rights which are grandfathered under Section A of Article V and have no bearing on this case. *See* M. Squillace, *A Critical Look at Wyoming Water Law*, 24 Land & Water L. Rev. 307, 319-327, 332 (1989); App. B ¶ 3. Wyoming has only 23 post-1950 water rights on the Tongue for the irrigation of 1,294 acres of land. App. B. ¶ 3.

The channel of the Tongue River is not dammed in Wyoming, but six post-1950 diversions from the river go into off-channel lakes or ponds. *Id.* ¶ 4. Five of these diversions, totaling 3,359 acre feet, are for fishing, wetlands, wildlife and stock uses. The largest of these, at 2,749 acre feet, is a below grade, reclaimed coal pit permitted for fish, wetlands, stock and wildlife use which does not actually receive direct diversions from the Tongue because it is not actively managed. *Id.* Only one of them, a 15 acre foot off-channel slough, stores water for irrigation. *Id.* Because of the nature of these ponds, the net cumulative annual increases or decreases in this storage measured under Article V, Section C. 2 of the Compact would be minimal.* The "point of measurement" on the Tongue River for purposes of Compact allocation calculations under

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* The only significant storage feature on the Tongue is Tongue River Reservoir, which has a capacity of 79,080 acre feet. Since it is located in Montana, it has no bearing on Montana's claims relating to Wyoming's water storage.

Article V, Sections B and C is a stream gauge at Intake, Montana, near Miles City. YRC art. V, § B.3.b.

The Powder River, like the Tongue, has few appurtenant post-1950 water rights governed by the Compact's third tier allocation. Wyoming recognizes 12 post-1950 water rights on the Powder, appurtenant to only 2,306 acres. App. B ¶ 5. There are no Wyoming storage projects that store water diverted from the Powder. *Id.* The "point of measurement" for Section B allocation is the gauge at Locate, Montana, near where the Powder enters the Yellowstone River. YRC art. V, § B.4.b.

The Little Powder River, a tributary to the Powder, is specifically included in the Compact's third tier allocation formula for post-1950 water rights under Article V, Section B. 4, most likely because it flows in both states, starting in Wyoming and crossing into Montana before joining the Powder. Wyoming recognizes 22 post-1950 water rights on the Little Powder to irrigate 1,367 acres. App. B ¶ 6. In Wyoming, the Little Powder is used to fill two very small irrigation storage projects of less than 35 acre feet. Both of these projects have a 1993 priority date. *Id.* Together, the Powder and Little Powder have 34 post-1950 rights to irrigate 3,673 Wyoming acres. *Id.*

Wyoming's limited development of post-1950 diversions and storage from the Tongue, Powder and Little Powder to date, makes it almost impossible for Wyoming to violate the Compact's third tier percentage allocation scheme, as will be explained below.

SUMMARY OF ARGUMENT

Montana claims that Wyoming has depleted the flows in the Tongue and Powder by developing groundwater wells, sprinkler irrigation, storage reservoirs, and new irrigated lands. However, the Compact does not control or even address groundwater. It contains no restrictions on irrigation methods such as sprinkler systems. As to new storage and new irrigated lands, the Compact drafters presumed that both states would develop such new uses on these rivers. That is why in Article V of the Compact the drafters allocated by percentages to each state the right to make post-1950 use of divertible surface water in the rivers. Montana ignores this plain allocation language for post-1950 uses and instead bases its claim on a non-depletion theory that is totally absent from the Compact. Montana also fails to adequately allege that its users suffered damages caused by Wyoming post-1950 uses. Montana's proposed Bill of Complaint lacks sufficient seriousness and dignity to survive this Court's gatekeeping analysis.

This Court can cure Montana's failure to develop a factual case by denying its motion and referring it to the Yellowstone River Compact Commission. The Compact Commission is an alternative forum with adequate powers to require Wyoming and Montana to collect, correlate and present factual data about their water rights and regulatory operations, a process Wyoming has subscribed to for many years. This Court is not the proper forum for an interstate compact dispute until there is more than a theoretical disagreement.

ARGUMENT

A. The Court's Gatekeeping Standards

This Court has held that its original jurisdiction should be exercised sparingly. *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). The Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Id.*, *quoting Texas v. New Mexico*, 462 U.S. 554, 570 (1983). The Court looks at two separate factors in exercising this discretion: (1) the seriousness and dignity of the complaining state's claim; and (2) the availability of an alternative forum in which the issue tendered can be resolved. *Mississippi*, 506 U.S. at 77.

This Court has not clearly stated the burden of proof that the plaintiff must carry to win its motion to file its bill of complaint. In several cases between states, this Court has required the plaintiff to show serious harm by clear and convincing evidence, but these cases involved proceedings after the Court granted leave to file the bill. Robert L. Stern et al., *Supreme Court Practice* 563 (8th ed. 2002); *e.g.*, *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931). Given the Court's desire to exercise original jurisdiction sparingly out of respect for state sovereignty, a clear and convincing standard makes sense.

The gatekeeping function is intended to prevent states from presenting legal arguments that border on the frivolous under the plain meaning of the relevant compact. A compact is a contract between states, as well as a federal statute. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983). "[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.*; *see also Oklahoma v.*

New Mexico, 501 U.S. 221, 245 (1991) (Rehnquist, J., dissenting). The Court is not free to rewrite a compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

Obviously, at the inception of an action, the universe of evidence is less than what the parties could develop after pleadings are filed and discovery completed. Nevertheless, the Court's gatekeeping function in these cases requires the complaining state to provide some substance. *Florida v. Mellon*, 273 U.S. 12, 17-18 (1927). The plaintiff state must show more than remote, speculative or indirect injury. *Id.* at 18.

B. Montana Fails to State a Claim regarding Wyoming's Groundwater Development

Montana alleges that Wyoming has violated Article V of the Compact by developing groundwater wells for irrigation and production of coalbed natural gas in the Tongue and Powder Basins after 1950. (Proposed Bill of Complaint 3, ¶ 11) However, the drafters of the Compact made it clear through plain language in their definitions of the "Yellowstone River System," "Tributary," and "Interstate Tributaries," that Article V is intended to deal only with surface waters. YRC art. II, §§ D, E, F. In a 1975 law review article, Helena, Montana lawyer Henry Loble made this same point when he wrote: "The Yellowstone River Compact makes no reference to or provision for the allocation and apportionment of interstate underground waters or what is often referred to as ground waters. In this it is no different from most other interstate water compacts." H. Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River Compact)*, 21 Rocky Mtn. Min. Law Inst. 777, 784 (1975).

Groundwater simply has no place in a case involving this Compact.

Montana reveals through its discussion of groundwater in its own brief that it is actually asking this Court to rewrite the Compact. After Montana states that "such [groundwater] pumping would constitute a violation of the Compact," it does not cite the Yellowstone River Compact. (Mont. Br. 15) Instead, it cites cases from this Court interpreting the Arkansas and Republican River Compacts. *Id.* Those compacts are explicitly based on the non-depletion principle. Arkansas River Compact, Pub. L. No. 81-82, 63 Stat. 145, art. IV.D (1949); *see also, Kansas v. Colorado*, 514 U.S. 673, 680 (1995); Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86, art. III (1943).

The Yellowstone River Compact is *not* a non-depletion compact. Its allocation of post-1950 water is based on the divertible flow principle, under which surface water that happens to be available for diversion from the rivers is allocated to the states by percentages. Students of the Compact, including three of Montana's own Water Division representatives, have confirmed in writing that the Compact is based on the divertible flow principle, not non-depletion. Appendix A, Letter and white paper from Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer 3 (1976) ("The compact is explicit in allocating waters based on diversions rather than depletions; in fact, return flows are never mentioned."); Dan Ashenberg, *A Cooperative Plan to Administer the Yellowstone River Compact*, (Water Resources Division, Montana DNRC Draft report Nov. 1983) (the Compact "apportions flows based on diversions, not on depletions."); Montana DNRC, *Yellowstone River Compact* 32 (Nov. 29, 1989) ("The apportionment formula in Article

V is based on diversions and not depletions."); *see also* Floyd A. Bishop, *Interstate Water Compacts and Mineral Development (Administrative Aspects)*, 21 Rocky Mtn. Min. Law Inst. 801, 802 (1975).

Maybe Montana wishes it had entered into a non-depletion compact containing the language of the Arkansas or Republican River compacts. However, this Court cannot interpret the Compact by looking to different language from other compacts between other states. *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

Besides asking this Court to rewrite the Compact to cover a subject that is totally absent, Montana fails to show that it has adequately investigated the facts surrounding its groundwater depletion claim. Montana claims that "[a]ll groundwater pumping has the *potential* to deplete the compacted waters of the Powder and Tongue Rivers," so "to the extent that such pumping depletes the waters," "such pumping *would constitute* a violation of the Compact." (Mont. Br. 15) (emphasis added). Thus, Montana does not actually claim that Wyoming groundwater development has adversely affected its users one iota. Even if the groundwater claim had any legal merit, this Court could not accept the case before Montana does its homework on causation and damages. *See Florida v. Mellon*, 273 U.S. 12, 17-18 (1927).

C. Montana Fails to State a Claim regarding Wyoming's Increased Irrigation Efficiencies

Montana alleges that Wyoming has violated the Compact by increasing the efficiency of its irrigation practices since 1950. (Proposed Bill of Complaint 4, ¶ 12). Wyoming does not deny that some of its irrigators on the

Tongue and Powder, like some Montana irrigators, have switched from flood to sprinkler irrigation. The question remains, however, how such efficiency improvements would violate the Compact.

As Montana has admitted, Wyoming's pre-1950 appropriative rights to surface waters are confirmed by Section A of Article V. (Mont. Br. 19) Section A specifically states that such water rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." As of 1950, Wyoming's appropriation law governing the acquisition and use of water from a river was quite clear on irrigators' rights to consume the water that they diverted. As long as the irrigators complied with their permits or adjudicated rights by applying the water only to their permitted acreage they could consume *all* of what they diverted. *Binning v. Miller*, 102 P.2d 54, 60-61 (Wyo. 1940); *Bower v. Big Horn Canal Association*, 307 P.2d 593, 601 (Wyo. 1957). Since this law was incorporated by the drafters of the Compact, Wyoming irrigators with pre-1950 water rights comply with the Compact regardless of whether they partially or completely eliminate return flows to the river through new irrigation methods.

In *Bower*, the Wyoming Supreme Court wrote:

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain.

307 P.2d 593 at 601.

Analysis of sprinkler irrigation by irrigators with post-1950 rights under Section B of Article V is no different than the Section A analysis for pre-1950 rights. When divertible surface water is available, Section B allows irrigators in Wyoming and Montana to divert water from the main stems of the Tongue and Powder for supplemental supplies to lands already under pre-1950 rights, and also for "direct diversions" onto new lands. In Section B, the drafters did not state what methods these irrigators must use to apply these diversions to their lands. They imposed no efficiency limit on irrigation, and no minimum flow that irrigators must return to the river from their land after using the water. As Montana's own Water Resources Division Administrator, Orrin Ferris, wrote about the Compact in 1976, "return flows are never mentioned." App. A at 3.

The restriction on the diversion of water to post-1950 rights that is set forth in the third tier of Article V of the Compact is not based on Wyoming's *consumption* of the water that its users divert. Instead, it is based on a running percentage of total divertible flows that Wyoming users have *diverted* from a river channel as of any particular date in the water year. YRC art. V, § C. 1-4. For example, if a Wyoming irrigator's diversion for his post-1950 right on the Tongue River does not push the cumulative annual percentage of Wyoming diversions above 40%, then Wyoming has complied with the Compact on that date. The amount of return flow to the river on that day is irrelevant, as long as the diversion at the headgate did not push Wyoming over the Compact's limit for total Wyoming diversions.

In summary, the plain language of the Compact defeats Montana's contention that Wyoming's irrigation

methods and efficiencies are somehow governed by the Compact. Montana and Wyoming irrigators are to be commended for the efficiency gains they have achieved with sprinklers, and this Court should not waste its time rewriting the Compact to provide return flows or consumption limits which the Compact drafters did not intend.

D. Montana Fails to State a Claim regarding Wyoming's Storage Development

In addition to challenging Wyoming's post-1950 development of groundwater and sprinkler irrigation, Montana questions Wyoming's construction and use of new water storage in the Tongue and Powder River Basins since 1950. (Proposed Bill of Complaint 3, ¶ 9) Montana does not deny that water storage is often a good thing in arid western states. It admits that "the only feasible means of supplying the year-round needs of the population from surface water is through water storage projects. . . ." (Mont. Br. 10-11); *see also Fed. Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941) (lauding water storage development). Montana cannot state a claim by simply making a parochial allegation that storage is a good thing in Montana but a bad thing in Wyoming. To state a claim it must allege how Wyoming's development of storage has actually violated the Compact.

Montana's storage claim lacks any legal support in the Compact. In their percentage allocation of remaining water under the third tier of Article V, the drafters of the Compact specifically provided for the future use of such water for "*storage* or direct diversions for beneficial use on new lands or for other purposes." YRC art. V, § B

(emphasis added). They then specified how the remaining water, including stored water, must be allocated between the states by percentages. The drafters thus contemplated that the states would construct post-1950 storage on the "Interstate Tributaries," and provided that such storage be allocated under the divertible flow principle.

Moreover, the Section C formula for measuring whether each state is staying within its percentage of cumulative divertible flow includes subsections for net changes in post-1950 stored water. YRC art. V, §§ C. 2 and C. 3. The drafters would not have included this post-1950 storage within the apportionment formula if they thought the states could not add storage on the Interstate Tributaries after 1950.

In addition, Montana cannot complain about the specific Wyoming reservoirs it discusses in its brief. (Mont. Br. 14) All of these reservoirs are located on tributaries to the Tongue and Powder, and not on the main stems of those rivers. The third tier allocation of Article V only allocates to each state the post-1950 storage rights (and direct diversion rights) for waters of the "Interstate Tributaries," and of the Little Powder River by specific inclusion.* The "Interstate Tributaries" are defined to include the main stems of the Powder and Tongue, not their tributaries. YRC art. II, § F. Thus, the Compact does not purport to govern water stored in reservoirs on the tributaries to the Tongue, Powder and Little Powder, the

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* In contrast to the third tier's allocation of water only from the main stems of the "Interstate Tributaries," the pre-1950 water rights grandfathered under Section A of Article V, apply to the "Yellowstone River System," which by definition includes not only the "Interstate Tributaries," but also the tributaries to the "Interstate Tributaries."

only reservoirs about which Montana complains. (See Mont. Br. 14 and App. A thereto at A-2 (map)).

A few small reservoirs have been constructed in Wyoming since 1950 along the main stems of the Tongue, Powder and Little Powder, so diversions from these rivers to them are governed by the third tier allocation. However, Montana does not complain about these reservoirs in its brief, as well it should not, since they are unlikely to cause any water shortages downstream.

Montana does not state specifically how any Wyoming reservoirs built after 1950 have caused damage to its users. The closest Montana gets to a damage allegation regarding Wyoming storage is its statement in its brief that "[a]ll of these developments since the adoption of the Compact have the *potential*, in some cases the *strong potential*, to increase the consumption of water in Wyoming." (Mont. Br. 16 (emphasis added)) After this weak attempt at a damage allegation, Montana then has the audacity to complain about a reservoir on the Middle Fork of the Powder in Wyoming that has never been built. (Mont. Br. 17) The Wyoming State Engineer received an application for a permit for this reservoir before the Compact was finalized, more than half a century ago, and nothing has come of it. This Court surely has enough to do without predicting how the construction and operation of a dam, which has not been built in over 50 years since it was permitted, could some day impact Montana users under the Compact.

In summary, Montana complains about post-1950 Wyoming storage reservoirs even though the Compact allows the storage of water in such reservoirs. Also, the particular reservoirs that Montana identifies are on

tributaries to the Tongue and Powder Rivers that are not covered by the third tier allocation of Article V. Finally, Montana's allegations that Wyoming's operation of such reservoirs has the "potential" to harm Montana do not yield a ripe claim for relief. Montana has not shown in its filings that reservoir storage is a serious and dignified issue justifying this Court's time.

E. Montana Fails to State a Claim regarding Wyoming's Added Irrigated Acreage

In its fourth significant allegation, Montana claims that Wyoming has violated the Compact by allowing new land to be put into irrigation from the Tongue and Powder Rivers after January 1, 1950. (Proposed Bill of Complaint 3, ¶ 10) Although the amount of land that may be legally irrigated from the Tongue, Powder and Little Powder in Wyoming under post-1950 rights is quite small, Wyoming concedes that it has recognized such new rights. Montana has also opened new lands to irrigation from the Tongue and the Powder after January 1, 1950, and Wyoming does not criticize Montana for doing so. The Compact, after all, states in its preamble that one of its purposes is "to encourage the beneficial development and use" of the Yellowstone River and its tributaries.

To determine how Montana thinks Wyoming has violated the Compact by recognizing post-1950 water rights to new lands, one must look beyond Montana's vague proposed Bill of Complaint and scrutinize its brief. On page 14 of that brief, Montana concedes: "Putting new lands under irrigation after January 1, 1950 is not, in and of itself, a violation of the Compact." But Montana then states: "Rather, in Montana's view, it is the failure of

Wyoming to curtail uses of water on such new lands, when necessary to protect Montana's rights under the Compact, that constitutes the Compact violation." (Mont. Br. 14) Montana fails to further explain what Montana rights have been damaged, what Wyoming diversions based on post-1950 rights caused such damage, and when such damage occurred. Montana's brief is devoid of facts or arguments on this critical issue.

Given Montana's failure during recent drought years to accept Wyoming's invitation to inspect actual diversions on the Tongue and Powder, it is not surprising that Montana has not specifically alleged that its irrigators have suffered from low flows as a result of post-1950 Wyoming uses. Montana has some duty to indicate that it has suffered damage before it asks this Court and Wyoming to commit significant resources to this case. *See Alabama v. Arizona*, 291 U.S. 286, 291-292 (1934) (damages are a necessary element of original jurisdiction). This Court's gatekeeping function would be well-served if the Court would deny Montana's motion until such time as it comes forward with specific justiciable claims of Compact violation, causation and injury.

Because Section A of Article V confirms only pre-1950 water rights in each state, it has no bearing on Wyoming's development of post-1950 rights. That is left to Section B, which again, only deals with surface water rights on the main stems of the Tongue, Powder (and Little Powder), Big Horn, and Clark's Fork of the Yellowstone (the "Interstate Tributaries"). Although Montana's proposed Bill of Complaint does not allege a particular year in which it thinks Wyoming allowed too many post-1950 diversions, the logical candidates are the drought years of 2004 and 2006, because they are the years in which Montana sent

letters of complaint to Wyoming. App. B ¶¶ 7, 12. To determine if Wyoming's post-1950 diversions exceeded Wyoming's percentage allocation on the Tongue of 40%, or its percentage allocation on the combined Powder and Little Powder of 42%, on any particular day in a water year, one must know the cumulative post-1950 diversions in Wyoming as of that date, and divide it by the cumulative quantity of divertible flow under subsections 1-4 of Section C. YRC art. V, § C.

Two kinds of post-1950 Wyoming diversions from these rivers must be combined to calculate the total Wyoming diversions subject to the allocation percentages: (1) direct diversions in Wyoming for irrigation or other uses, and (2) diversions into storage in Wyoming. The total divertible flow to which the Wyoming diversions are compared consists of cumulative diversions in both states from October 1 to the date at issue, cumulative diversions into post-1950 storage in both states, and the cumulative amount of water that flowed past the point of measurement at the bottom of the particular river. YRC art. V, § C.

Montana's Administrator of Water Resources, Jack Stults, wrote letters to Wyoming's State Engineer on May 18, 2004 and July 28, 2006 complaining about the low level of the Tongue and Powder Rivers. Calculating the compact percentages on the Tongue and Powder/Little Powder using these dates, shows how frivolous Montana's claim about Wyoming's post-1950 use really is. Even when giving Montana the benefit of all doubt on its own and Wyoming's diversions from these rivers in 2004 and 2006, Wyoming's use of the cumulative divertible flows must have been well below the Compact percentages of 40% and 42%. *See* App. B ¶ 18 (Affidavit of Wyoming State Engineer Patrick Tyrrell with calculations based on actual

flows past the points of measurement, actual Wyoming water rights, and with other assumptions disfavoring Wyoming). As of May 18, 2004, Wyoming's post-1950 total diversions from the Tongue would have been no more than 9.8% of the 40% to which it was entitled, and its total diversions from the Powder/Little Powder no more than 6.8%, of the 42% to which it was entitled. App. B ¶¶ 18a. and 18c. As of July 28, 2006 Wyoming's total diversions would have been no more than 6.1% (Tongue) and 4.6% (Powder/Little Powder). App. B ¶¶ 18b. and 18d.

The reasons why Montana has not alleged that Wyoming has diverted water in excess of its percentage allocations for post-1950 rights are simple. Wyoming has not added enough direct flow or storage rights on the Tongue, Powder or Little Powder Rivers since 1950 to do so, and Montana regularly allows large quantities of water to flow unused and unstored down the Powder and the Tongue past the points of measurement. *See* App. B ¶ 18. Wyoming's post-1950 direct diversion original rights to new land on the main stems of these rivers allows for the irrigation of only 3,382 acres. App. B ¶¶ 3, 5, 6. Wyoming's post-1950 storage that may be filled by diversions from these rivers totals only 3,439 acre feet, and most of that storage is in trout ponds that are never drained and refilled. *Id.* ¶¶ 4, 6. Even if Wyoming had used all of its post-1950 original and storage water rights in 2004 and 2006, such use would be a drop in the bucket.

One of the pro-Montana assumptions embedded in these calculations was that Wyoming irrigators and reservoir owners with post-1950 rights on the main stems of the Tongue, Powder, and Little Powder would divert their full appropriations from April 1 through the dates of the Montana letters. However, the probability is very small that more than a few incidental irrigators using

these post-1950 rights would still have been diverting after drought conditions in 2004 and 2006 had caused Montana to write its letters. In 2004, for example, the Tongue River flowed at 20% of average over the season, and the Powder carried a record low flow at 14% of average over the season. Yellowstone River Compact Commission, Fifty-third Annual Report V (2004); App. B ¶ 16.

Those rivers are the source of supply for numerous Wyoming pre-1950 rights, many of which would not be satisfied under drought conditions. Any post-1950 rights would be junior to these pre-1950 rights and those junior rights are the first to be denied water when intrastate regulation occurs under Wyoming prior appropriation law. App. B ¶ 16; WYO. CONST. art. 8, § 3. In a November, 1983 draft report, entitled *A Cooperative Plan to Administer the Yellowstone River Compact*, Dan Ashenberg of Montana's DNRC, Water Resources Division, explained this reality quite well:

> The Yellowstone River Compact recognizes all water rights existing as of January 1, 1950. The result is that the Compact does not address the division of water during extremely low flow periods because the majority of appropriations in the Yellowstone Basin have a priority date earlier than 1950. If there is insufficient water to satisfy all pre-1950 uses in both states, Wyoming water users would first satisfy their pre-1950 demands. Montana users could then appropriate the remainder, including the accumulated return flow generated in Wyoming. Because agricultural and industrial development since 1950 has been minimal, the need to regulate post-1950 appropriations in Wyoming for the purpose of satisfying pre-1950 appropriations in Montana would also be minimal.

In summary, when the correct divertible flow principle, embodied in Sections B and C of Article V, is applied to the actual facts that Montana has yet to explore, Montana is unable to state a valid claim for relief. This is equally true for Wyoming's post-1950 development of new irrigated land, and Wyoming's post 1950 development of groundwater, sprinkler systems, and reservoirs. Montana has not made a sufficient showing of an actual Compact violation that presents a ripe controversy to this Court. *See Texas v. United States*, 523 U.S. 296, 300-302 (1998). Its claims are not of sufficient seriousness or dignity to justify further proceedings in this Court.

F. Montana has an Adequate Alternative Forum

Besides analyzing the seriousness of a state's claim, this Court may also consider whether the state will have an adequate alternative forum if the Court denies the state's motion to file. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Wyoming agrees with Montana that the Yellowstone River Compact Commission is not a forum charged with interpreting the Compact. If Wyoming had violated the Compact and Montana had credible facts and valid legal arguments establishing such violations, then a dispute over Montana's Compact interpretations should go to this Court, and not the Compact Commission. However, Montana blatantly contradicts the plain terms of the Compact when it complains of river "depletion," and fails to allege divertible flow violations under Article V. It also shirks its duty to this Court and to Wyoming, when it fails to allege that Wyoming users have actually violated the Compact and that such violations actually caused harm to Montana users. Potential for harm, or even the strong

potential for harm, is not enough to make a justiciable case or controversy. (*See* Mont. Br. 16.)

Given Montana's inability to state a case under the Compact, the Compact Commission is exactly the right forum for Montana. The commission has the authority under Article III, Section C of the Compact to assist Montana in investigating the facts of how Wyoming has used the Tongue, Powder and Little Powder Rivers through both abundance and drought. "[T]he jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact . . ." YRC art. III, § C. History shows that Wyoming will fully cooperate with the commission, the commission's technical committee, and Montana, to get the facts. Wyoming has backed its cooperative spirit with appropriated funds. But even if Wyoming were to fail to cooperate, the commission has the power to get the facts.

Lacking any facts to support substantial allegations that Wyoming has violated the Compact, and that such violations have caused damages to Montana users, Montana is merely seeking an advisory opinion on Compact interpretation from this Court. Montana's remote and speculative factual allegations are accompanied by invalid legal claims for relief under the plain terms of the Compact. Montana has failed to show that it has a serious and dignified claim as required to satisfy this Court's gatekeeping analysis, so this Court should deny its motion to file. Moreover, because the Compact Commission is an adequate alternative forum for Montana, this Court should deny Montana's motion based on this second factor of the Court's gatekeeping analysis.

CONCLUSION

Wyoming requests that the Court deny Montana's Motion for Leave to File Bill of Complaint.

Respectfully submitted,

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April 2007

APPENDIX A

[LOGO]

WATER RESOURCES
DIVISION

ORRIN FERRIS
ADMINISTRATOR

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
THOMAS L. JUDGE, GOVERNOR
GARY WICKS, DIRECTOR

MEMBERS OF THE BOARD
JOSEPH W. SABOL, CHAIRMAN
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WILLIAM BERTSCHE
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449-2872
32 SOUTH EWING
NATURAL RESOURCES
BUILDING
HELENA, MONTANA 59601

March 2, 1976

Mr. George Christopulos
State Engineer
State Office Building East
Cheyenne, WY 82002

Dear Mr. Christopulos:

Last December we agreed to exchange letters prior to our March meeting so that each state could gain a better understanding of compact issues. Attached is a paper which is our attempt to describe the differences or similarities in each state's water law as seen from a planning perspective. The paper has not been reviewed by counsel so may be weak in that area. At any rate, I hope this is helpful.

Will see you next week.

Sincerely,

/s/ Orrin Ferris
Orrin Ferris, Administrator
Water Resources Division

OF/jc

cc: Frank Trelease
Jack Acord
Rick Bondy
Ted Doney
Walter Scott
George Pike
Laurence Siroky

PRIORITY DATES

In Wyoming an appropriation right is initiated by making application to the State Engineer for a permit to make the appropriation; and the final step after the appropriation has been perfected in accordance with the permit is the adjudication of the right by the Board of Control and the issuance by the Board of a certificate of appropriation. The priority of each appropriation dates from the filing of the application in the office of the State Engineer. This procedure has been in effect since 1890. Failure to make use of appropriated water for five successive years is considered abandonment and forfeits that water right; however, an extension may be granted by the State Engineer.

Adjudication of water rights are initiated and made by the Board of Control. The State Engineer, in the original adjudication of a stream makes a hydraulic survey, and

the water division superintendent takes testimony concerning claims of water rights. This information is transmitted to the Board of Control, which enters an order determining and establishing the priorities.

No allotment for the direct use of the natural unstored flow of any stream shall exceed one cubic foot per second for each seventy acres of land. However, if there is water in any stream, in excess of all appropriations, this excess will be divided among the appropriators in proportion to the acreage covered by their permits, up to a maximum of 1 cfs per 70 acres.

In Montana, prior to the 1973 Water Use Act, a water right was obtained by either filing with the County (called "filings") or by merely using the water (called "use" rights). For "use" rights the date of priority is the date the water was actually put to use, while for "filings" the priority date is the date the appropriator posted a notice at the intended point of diversion. Rights could be abandoned by filing or through court action.

Under the 1973 Water Use Act the appropriator must file with the Department of Natural Resources and Conservation. If the application is complete and all requirements met, the applicant will be issued a provisional water right that may be modified during court adjudication. The priority date of the water right is the date the Department receives the application. After adjudication the right may be abandoned by 10 consecutive years of nonuse and by petition to the court. There is no set limit in the law on the amount of water that may be appropriated for each acre irrigated. Water may be appropriated only to the limit of beneficial use.

A basic issue in compact negotiations is the determination of pre and post 1950 rights. While Wyoming may have a better handle on rights because of their long standing centralized water law, it is apparent that the filings received by the State Engineer do not necessarily correlate with the amount of water actually put to use. In fact, it is estimated that only 50% of adjudicated rights are used. Montana will have difficulty in documenting water rights pre and post 1950. These rights can be estimated following the logic that Bechtel Corporation used in their "Tongue River Project, Water Allocation Study". Bechtel estimated irrigated acres, and assuming a unit water requirement, derived total water use.

SUPPLEMENTAL WATER

In Wyoming, a supplemental water right is for direct flow diversion of water from a new source of supply for application to lands for which an appropriation of water from a primary source already exists. The total amount of water diverted at any one time, both under a primary appropriation of water and a supplemental supply shall not exceed 1 cfs per 70 acres. Supplemental water, by Wyoming definition, is not water firmed up by storage from the original source. The supplemental supply right priority date has no relation to the original water right. Wyoming water law provision for supplemental water supply do not apply to water stored under a reservoir permit.

There are no provisions for supplemental water in Montana Water Law, each new use is a new right with a separate priority date.

Since in both states each new use is a new right with a separate priority date no significant problem exists except in interpreting the intent of the "supplemental water" portion of the compact. The supplemental water supplies mentioned in the compact does not relate to the definition in Wyoming's water law. The framers of the compact wanted to ensure that sufficient water was allocated to each state so that pre 1950 lands could receive a full water supply from any source, be it a new source or from storage on the original source.

According to the Compact, these supplemental rights are "to be acquired . . . in accordance with the laws governing the . . . use of water under the doctrine of appropriation." Supplemental water supply for pre 1950 irrigated lands is allocated to each state and the remainder of unused and unappropriated water is then shared on the compact percentage basis. Mutually satisfactory studies have not been made that define valid supplemental water requirements for both states. This item is a major compact consideration and should receive early and close examination.

METHOD OF DETERMINING DIVERSIONS

Diversion is defined in the Compact as the "taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or the tributary from which it is taken." The compact is explicit in allocating waters based on diversions rather than depletions, in fact, return flows are never mentioned. It is apparent, however, that compact allocations based entirely on diversions would favor diversions

for uses that consumed the greater portion of total diversions, for example, industrial use. The original compact negotiators could not see the potential dangers of a diversion based compact since they had no forewarning of energy development and other uses that would totally consume diverted water.

In both states, any change of water right from irrigation use to industrial use would carry with it only the amount that was consumed in the original right. This, however, does not solve the problem of new appropriations. To ensure equitable allocations, it is necessary to somehow account for the depletions involved with individual or cumulative diversions.

SENIOR DOWNSTREAM RIGHTS

Bureau of Reclamation operation studies showed releases from Yellowtail one year (1961) to satisfy downstream rights. Our basic questions were – where are these rights, what are the priority dates, and which tributaries must contribute to these rights? We should identify these "senior rights", but as indicated in our December meeting, these rights would be taken care of automatically in modeling the entire Yellowstone system.

STOCK WATER

Existing and future domestic and stock water uses are excluded from compact provisions as long as stock water ponds are less than 20 acre-feet in size. Wyoming encourages stock water applicants to keep stock water reservoirs below the 20 acre feet capacity by not requiring detailed plans and map work for such structures. Montana now

requires a permit application for stock water use, regardless of size.

RESERVOIR WATER RIGHTS

The question of water use from reservoirs brings up the issue of preferential use in Wyoming. Preferred uses include rights for domestic and transportation purposes, as follows, first, drinking; second, municipal; third, steam engines and general railway use; and fourth, culinary, laundry, bathing, refrigeration; and heating plants. The use of water for irrigation is preferred to any use of water through turbine or impulse water wheels for power purposes. Existing rights that are not preferred may be condemned to supply water for preferred uses. It is possible to change a use to a preferred use under the direction of the Board of Control with compensation to be paid if the change is approved.

In Wyoming, persons planning to store water must make application to the State Engineer for a permit to construct a reservoir. Detailed maps and plans can be required except for stock water exceptions mentioned above. Apparently, the priority date of stored water dates from the application date, even though water may not be put to beneficial use until years later (as happened with Boysen).

In Montana, persons intending to appropriate water by means of a reservoir apply for a permit in the same fashion as a direct flow appropriator. The priority of the right is the application receipt date by the DNR&C.

In both states, if an appropriator does not commence work on the project as specified in the permit, or receive an extension, the state can revoke the permit.

Boysen and Tongue River reservoirs are significant pre 1950 priority date reservoirs. J.S. James, Montana State Engineer, on April 19, 1937, filed on all of the unappropriated waters of the Tongue River for purposes of the Tongue River Reservoir. The priority date of Boysen Reservoir is October 22, 1945.

RESERVOIR EVAPORATION

Reservoir evaporation could be accounted for by change in storage levels. In filling the reservoir the water required to make up evaporation losses is allocated to that state through storage change considerations; the same is true during releases. As long as storage levels are monitored and changes correctly assigned to the state where the reservoir is located, evaporation is accounted for. In fact, if evaporation is measured along with inflow and outflow measurements, the evaporation is double counted.

INSTREAM FLOWS

Wyoming has no provision for instream flows in their water law, although through reservoir operation it may be possible to provide water for instream use. Of course fish and wildlife values are now a beneficial use in Montana. It is DNR&C opinion that no claims for a pre-1950 fish and wildlife rights are valid.

SURPLUS WATER - WYOMING

Surplus water is the quantity of water belonging to the State of Wyoming flowing in the natural channel of any main stream or tributary, at any time in excess of the total amount required to furnish to all appropriators the maximum water in the appropriation. A right to the use of surplus water is a maximum of one cubic foot of water per seventy acres having a water right. Surplus rights bear the date of priority as of March 1, 1945 when attached to an adjudicated right. Unadjudicated rights acquire the surplus right as the original is perfected. When anyone has applied surplus water to beneficial use, he is entitled to divert and use his proportionate share of surplus water and is entitled to a priority senior to any water right acquired after March 1, 1945.

APPENDIX B

No. 137, Original

In The

Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING,

and

STATE OF NORTH DAKOTA,

Defendants.

AFFIDAVIT OF PATRICK T. TYRRELL

Patrick T. Tyrrell, being sworn, states:

1. I am the current Wyoming State Engineer. I have held that position since January 16, 2001, when I was appointed by the Governor of Wyoming. I make this affidavit in support of the State of Wyoming's Brief in Opposition to the State of Montana's Motion for Leave to File a Bill of Complaint in this case

2. Under Article 8, § 5 of the Wyoming Constitution, I am given "general supervision of the waters of the state and of the officers connected with its distribution." Based on this constitutional authority as well as Wyoming statutory authority, I supervise an agency with a staff of approximately 140 persons from my office in Cheyenne, Wyoming. This staff includes four water division superintendents, one for each of the four water divisions into which Wyoming is divided, and their staffs. The Tongue

and Powder River drainages are located within Water Division II. I have access to all documentation and information that is maintained regarding Water Division II, including information kept at that division's field office in Sheridan, Wyoming and information kept in my offices in Cheyenne.

3. The majority of Wyoming original and supplemental water rights for diversions from the main stem of the Tongue River are for irrigation use and have priority dates preceding January 1, 1950. Wyoming has 23 post-1950 water rights on the main stem of the Tongue River for the irrigation of 1,294 acres. Of these acres, 753 are irrigated with original post-1950 rights.

4. Six post-1950 diversions from the main stem of the Tongue River in Wyoming are permitted to go into lakes or ponds. Five of these diversions, totaling 3,360 acre feet, are for fishing, wetlands, wildlife and stock uses. One of them, a 15 acre foot off-channel slough, stores water for irrigation. The largest of them, at 2,749 acre feet, is a reclaimed, below grade coal pit that is filled with water and permitted for fish, wetland, stock and wildlife uses, but is not actively managed, its level being closely related to river stage. Since most of the Tongue River storage is to maintain fish and wildlife and not for irrigation, these lakes and ponds are not generally drained in large amounts annually and they require only minor refilling from time to time to compensate for leakage, evaporation and stock ingestion.

5. There are 12 original and supplemental water rights on the main stem of the Powder River with post-1950 priority dates, for irrigation of 2,306 acres. Of these acres, 1,417 are irrigated with original post-1950 rights.

There are no Wyoming storage projects that store water diverted from the Powder.

6. In Wyoming, the Little Powder River contains two irrigation storage projects of less than 35 acre feet (64 af total), each with a 1993 priority date. Wyoming recognizes 22 post-1950 original and supplemental water rights on the Little Powder to irrigate 1,367 acres. Of these acres, 1,212 are irrigated with original post-1950 rights. Together, the Powder and Little Powder Rivers have 34 post-1950 rights to irrigate 3,673 acres. The information on Wyoming rights in paragraphs 3-6 above has been publicly available for years, and available on the Wyoming State Engineer's website since October of 2003.

7. On May 18, 2004, Jack Stults, Division Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation, wrote me a letter regarding "Call for Water under Yellowstone River Compact." In that year, a drought afflicted both the Tongue and Powder River drainages in Wyoming and Montana. In his letter, Mr. Stults stated that insufficient water was flowing into Montana in the Tongue, Powder, and Little Powder Rivers to satisfy all pre-1950 Montana water rights. He did not make a non-depletion argument that Wyoming was obligated to ensure that the rivers stayed above some certain flow rates at the state line. Instead, he took the position that Wyoming should reduce its diversions of junior Wyoming pre-1950 water to satisfy rights of Montana users with pre-1950 water rights that were senior to the Wyoming rights. He wrote: "We are calling for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers." Mr. Stults also demanded in his letter that Wyoming require its

owners of stored water in the Tongue and Powder drainages to immediately release all water that had been previously stored under post-1950 rights. I responded to the letter with a letter to Mr. Stults dated May 24, 2004.

8. In my letter of May 24, 2004 to Mr. Stults, I suggested a meeting in early June to discuss the issues raised by his letter. Mr. Stults, attorneys for each state, and members of our staffs, did have a face to face meeting on June 10, 2004 in Sheridan, Wyoming and had a wide ranging discussion of compact issues. We met again on June 30, 2004 by conference call, and that call led the parties to submit information requests to each other. In the June 30, 2004 conference call, Mr. Stults and I also agreed to assign information gathering and sharing to our technical staffs, to include tours of both the Montana and Wyoming parts of the Tongue and Powder Rivers to review irrigation practices and water use. In June of 2004, we provided Montana with a copy of our Tabulation of Adjudicated Water Rights of the State of Wyoming – Water Division Number 2, Surface Water, covering both the Powder and Tongue Rivers. After reviewing each others' written information requests, Mr. Stults and I spoke again on July 28, 2004 and we agreed to have our subordinates, Sue Lowry (Wyoming) and Rich Moy (Montana), review the requests and prioritize the joint data gathering and analysis. Sue Lowry sent an electronic mail message to Rich Moy on August 4, 2004 in which she offered dates later in August to go over data requests and to tour Wyoming diversions. Montana did not agree to a date in August for this activity. However, Ms. Lowry saw Mr. Moy at a Missouri River Basin Association meeting on September 8, 2004, and they agreed to have a technical committee meeting in Sheridan, Wyoming on October 20, 2004. On

October 15, 2004, Mr. Moy sent an electronic mail message to Ms. Lowry stating that Montana would have to cancel the meeting because Montana representatives had not prepared for it.

9. An annual Yellowstone River Compact Commission meeting was held in Billings, Montana on December 6, 2004, and I attended as Wyoming's commissioner. Montana and Wyoming agreed that Ms. Lowry and Mr. Moy would meet to develop technical procedures and bring them to the next compact commission meeting in April, 2005. Ms. Lowry and Mr. Moy did not accomplish their assigned tasks, however, because on January 19, 2005, at a Missouri River Basin Association Meeting, Mr. Moy spoke with Ms. Lowry and declined to propose a meeting date because the Montana Attorney General's Office had advised that Montana should go to court to get a declaratory judgment on the Yellowstone River Compact.

10. A meeting of the Technical Committee of the Yellowstone River Compact Commission was held in Sheridan, Wyoming on April 25, 2005, the day before a meeting of the full commission. At the Technical Committee meeting, Wyoming presented information on storage facilities in the Tongue and Powder River drainages. The Technical Committee also selected November 29, 2005 as the date of the next Technical Committee meeting, but on October 24, 2005, Montana canceled the November meeting. At the Yellowstone River Compact Commission meeting that was held in Billings on November 30, 2005, Ms. Lowry stated that the Technical Committee needed direction concerning its task of forecasting and estimating during drought years the number of water rights that could be filled, since that task required discussions between the states and a commitment of time from each

state to better understand each state's administrative system. Montana's Commissioner Stults replied that the task would be a great thing to do, but was not feasible because of resource constraints. In spite of Montana's failure to go ahead with most of the technical investigation, the Division II superintendent did provide Montana with copies of his hydrographer's reports for the Tongue and Powder River drainages for the 2004 and 2005 water years. The 2006 report has not yet been provided to Montana because it is still being prepared. The hydrographer's reports contain data on diversions that actually occurred in the Tongue and Powder River drainages.

11. In July of 2005, I requested in the Wyoming State Engineer's fiscal year 2007-2008 budget request that the Wyoming State Legislature appropriate $100,000 to contribute to a joint study with Montana of technical issues involving waters of the Yellowstone River Compact rivers. Despite Montana's failure to participate in technical meetings and tours, I proceeded to seek this appropriation in 2005 and during the 2006 session of the Wyoming Legislature. The legislature approved the request, and the $100,000 was appropriated in 2006.

12. Water was plentiful in the Tongue and Powder drainages in the 2005 water year. However, drought conditions returned in 2006. On July 28, 2006, Mr. Stults wrote me a letter requesting that Wyoming administer the waters of the Tongue and Powder Rivers by curtailing post-1950 diversions or storage. I responded with a letter dated August 9, 2006 to Rich Moy, who had become acting Division Administrator of Montana's Water Resources Division upon Mr. Stults's departure.

13. In late November of 2006, I received from the federal representative to the Yellowstone River Compact Commission a draft resolution that I understood Montana would propose at the December 6, 2006 meeting of the Yellowstone River Compact Commission. Montana contended that Wyoming had an obligation not to deplete surface water in the Tongue and Powder through groundwater withdrawals. Montana did offer the resolution at the commission meeting on December 6, 2006, but it did not come to a vote of the commission because it was not seconded.

14. To the best of my ability, I have calculated Wyoming's diversions from the Tongue, Powder and Little Powder Rivers as a percentage of the total divertible flow under Article V, Section C, of the Yellowstone River Compact as of the dates of the letters from Jack Stults to me on May 18, 2004 and July 28, 2006. Using figures that are available, including Yellowstone River Compact Commission figures and United States Geological Survey streamflow data for flows past the points of measurement, and by making several pro-Montana assumptions that would reflect maximum legal Wyoming use and minimum overall use in the rivers, I have been able to calculate the maximum percentages of Wyoming's use on those dates.

15. My first assumption for purposes of the calculations involves the Wyoming storage reservoirs that may be filled from diversions from the Tongue and Little Powder. I did not consider the Powder because it has no storage on its main stem in Wyoming. Although most of the storage on the Tongue and Powder is for fisheries and wildlife, and would not be drained from year to year, I assumed for purposes of my calculations that all of these reservoirs were drained and filled completely in the 2004 and 2006

water years before the dates of Mr. Stults's letters, which would result in a net gain in storage of their full capacities. Those total capacities were 3,375 acre feet of storage from the Tongue, and 64 acre feet from the Little Powder.

16. My second assumption for purposes of the calculations was that all of the Wyoming users with post-1950 direct diversion rights on the main stems of the Tongue, Powder and Little Powder, diverted the full amounts under those rights from April 1 to the dates of Mr. Stults's letters. This assumption is most likely a great overstatement of such Wyoming diversions. First, most irrigation diversions from these rivers would not begin until after April 1. Second, the probability is very small that more than one or two incidental irrigators using these post-1950 rights would still have been diverting after drought conditions in 2004 and 2006 had reduced Wyoming pre-1950 uses by the dates in question, May 18, 2004 and July 28, 2006. In 2004, the Tongue River flowed at 20% of average over the season, and the Powder carried a record low flow at 14% of average over the season. The Tongue, Powder and Little Powder are the source of supply for numerous Wyoming pre-1950 rights, many of which would not be satisfied under drought conditions, and the post-1950 rights thereon are also highly unlikely to get water during such low flows. Any post-1950 rights are the first to be denied water if intrastate regulation occurs under Wyoming prior appropriation law.

17. My third and fourth assumptions are that Montana diverted no water from the Tongue, Powder or Little Powder Rivers for post-1950 rights in either the 2004 or 2006 water years, and Montana had no net increase in storage in either of those years under Sections C.2. and C.3. of Article V of the Compact.

18. My calculations of the maximum possible Wyoming percentages of use on the Tongue and Powder/Little Powder in the 2004 and 2006 water years as of May 18, 2004 and July 28, 2006 are as follows (these calculations are based on a conversion from cubic feet per second ("cfs") to acre feet ("af") in which 1 cfs of flow per day = 1.98 af/day):

a. Tongue River as of May 18, 2004

Wyoming maximum diversions: 14.3 cfs/day of post-1950 rights = 28.32 af/day X 48 days (April 1-May 18) = 1,359 af of direct flow + 3,375 af storage capacity = 4,734 af

Total divertible flow: 43,719 af actual total flows measured at point of measurement at Intake, Montana from Oct. 1, 2003 through May 18, 2004 + 4,734 af Wyoming maximum diversions = 48,453 af.

4,734 af maximum Wyoming diversions divided by 48,453 af total divertible flow = 9.8%.

b. Tongue River as of July 28, 2006

Wyoming maximum diversions: 28.32 af/day of post-1950 rights X 119 days (April 1-July 28) = 3,370 af of direct flow + 3,375 af storage capacity = 6,745 af.

Total divertible flow: 103,813 af total flows past point of measurement at Intake, Montana from Oct. 1, 2005 through July 28, 2006 + 6,745 af Wyoming maximum diversions = 110,558 af.

6745 af maximum Wyoming diversions divided by 110,558 af total divertible flow = 6.1%.

c. Powder and Little Powder as of May 18, 2004

Wyoming maximum diversions: 37.63 cfs/day of post-1950 rights = 74.51 af/day X 48 days (April 1-May 18) = 3,576 af of direct flow + 64 af storage capacity = 3,640 af.

Total divertible flow: 50,120 af actual total flows measured at point of measurement at Locate, Montana from Oct. 1, 2003 through May 18, 2004 + 3,640 af Wyoming maximum diversions = 53,760 af.

3,640 af maximum Wyoming diversions divided by 53,760 af total divertible flow = 6.8%.

d. Powder and Little Powder as of July 28, 2006

Wyoming maximum diversions: 37.63 cfs/day of post-1950 rights = 74.51 af/day X 119 days (April 1-July 28) = 8,867 af of direct flow + 64 af storage capacity = 8,931 af.

Total divertible flow: 186,835 af actual total flows measured at point of measurement at Locate, Montana from Oct. 1, 2005 through July 28, 2006 + 8,931 af Wyoming maximum diversions = 195,766 af.

8,931 af maximum Wyoming diversions divided by 195,766 af total divertible flow = 4.6%.

Dated this 30th day of March, 2007.

/s/ Patrick T. Tyrrell
Patrick T. Tyrrell,
Wyoming State Engineer

STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

The foregoing AFFIDAVIT OF PATRICK T. TYRRELL was subscribed and sworn to before me, a notary public, by Patrick T. Tyrrell this 30th day of March, 2007.

Witness my hand and official seal.

/s/ Kari S. Rayment
Notary Public

My Commission Expires: May 4, 2010

[SEAL]

APPENDIX C

State Engineer's Office

Herschler Building, 4-E Cheyenne, Wyoming 82002
(307) 777-7354 FAX (307) 777-5451
seoleg@state.wy.us

[LOGO]

DAVE FREUDENTHAL
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

May 24, 2004

Mr. Jack Stults
Division Administrator
Water Resources Division
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, Montana 59620-1601

Dear Jack:

As requested in your letter of May 18, I am providing Wyoming's initial response to the issues you raised within a week of receipt of your letter. I appreciate that this multi-year drought has caused unprecedented low stream-flow in many areas of both of our states. The lack of water is taking its toll on our water users as well and we are experiencing similar conditions to those outlined in your letter. We too are regulating water rights back to the 1880's in the Tongue and Powder River basins, and have numerous pre-1950 rights going unfulfilled. But, that is the priority system – the right to make beneficial use of water, in priority, when it is available. Neither of our states can guarantee a water right will always be fulfilled just because it gets water in more normal years.

Let me begin by saying that there maybe a misunderstanding of the Wyoming Reservoirs Capacity Report we gave you at the April 2004 technical meeting. What the Report intended to present in the first two columns is reservoir capacity, not the actual volume of stored water. The third column is the total of stored water in each reservoir as of October 1, 2003. For example, Park Reservoir has 7,347 acre-feet (a.f.) of pre-1950 and 3,015 a.f. of post-1950 priority water rights. On October 1, 2003, it held only 3,388 a.f., clearly within its pre-1950 priority capacity. I have requested that Mike Whitaker and his staff visit each of the reservoirs that have the potential to store Powder or Tongue River flows. He will be verifying the contents of each of the reservoirs and determining how much has been stored in the current water year under their various priority rights.

Our states have discussed in the past that the Yellowstone River Compact does not provide an explicit mechanism for administration as compared to some of our other compacts. In the mid-1980's, both states delved into the complexities of administration of the Compact, although in the end no formal system was adopted. Clearly, even then, it was understood to be far more complicated than simply releasing water when one party claimed a shortage. Because the Compact itself contains no provision describing how a "call" would occur, we find ourselves as the states' commissioners heading into uncharted territory. While I understand the pressures that led to your sending your letter, it is not at all clear what Wyoming's obligations are in response. I want to be clear that Wyoming is committed to making the Compact work according to its terms, but I am not aware that Wyoming has stored any post-1950 water except when it has had a right to do so.

As I stated earlier, the Compact makes no provision for any state to make a call on a river. The Compact does not apportion direct flow at the state line, nor does it establish or direct the establishment of an interstate priority schedule. In your letter you call "for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers." I am not sure what you are asking Wyoming to do. Wyoming does not read the Compact as an agreement to deliver any of Wyoming's pre-1950 direct flow water to Montana for Montana's pre-1950 rights. Instead, Article V, Section A, especially when read in conjunction with Article XVIII, simply expresses that the status quo of January 1, 1950 within each state is preserved.

What water is apportioned is specified in Article V Section B, which allocates between the states any water that was not used and not appropriated as of January 1, 1950. On the Tongue, Montana is to receive 60 percent of the post-1950 direct flow water and post-1950 storable water; and on the Powder, 58 percent of the same categories; both measured as provided in the Compact. Wyoming is allocated the remaining 40 and 42 percent which means that we, too, have a significant allocation of and right to the use of post-1950 water.

Once I have a report back from our field personnel (which should be within the next week), I suggest that we talk face-to-face about how to administer the Compact. Because Article V, Section B provides both states with a percentage of unused water, and Article V, Section C provides that the water subject to apportionment be calculated for the current water year only, our work will be of little value unless Montana also provides an accounting of its storage over the same period (since October 1, 2003). We request

that you provide that accounting. Then, I look forward to sitting down with you and your staff to discuss how Article 5 Section B operates. At this meeting, we can explore whether we believe these discussions trigger the conflict resolution procedures outlined in the December 19, 1995 Rules for the Resolution of Disputes, Section II D:

> 'Either state can initiate the dispute resolution process defined in Sections IV, V, and VI, and the other state is obligated to participate in good faith. The states agree that the issues pursued under this dispute resolution process shall be both substantive and require timely resolution.'

I hope that we can come to an understanding about the operation of the Compact without having to invoke formal procedures or elevating the issue unnecessarily. Jack, I know you will be out of the office until June 7 and that Kevin is acting in your stead. Due to the seriousness of the matters outlined in your letter I believe that we as commissioners need to first address some basic Compact concepts before we ask the Technical Committee to become involved. Without fine direction from the commission, it will be difficult for the Technical Committee to make progress. Kevin, or Jack, I look forward to hearing from you to set up a meeting to discuss how the Commission should respond to a call for regulation of this nature. As a start, I will suggest June 7, 8, or 9.

Sincerely,

/s/ Patrick T. Tyrrell
Patrick T. Tyrrell
State Engineer
Commissioner for Wyoming

cc: Governor Freudenthal
Jim Kircher, Chairman and Federal Representative,
Yellowstone River Compact Commission

APPENDIX D

State Engineer's Office

Herschler Building, 4-E Cheyenne, Wyoming 82002
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[LOGO]

DAVE FREUDENTHAL
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

August 9, 2006

Mr. Rich Moy
Acting Division Administrator
Water Resources Division
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, Montana 59620-1601

Dear Rich:

I am providing Wyoming's initial response to the issues Jack Stults raised in his letter of July 28, 2006. As we discussed when Montana sent a similar letter in 2004, this multi-year drought has caused unprecedented low stream flow in many areas of both of our states. The lack of water is taking its toll on our water users as well and we are experiencing similar conditions to those outlined in your letter. We too are regulating water rights back to the 1880's in the Tongue and Powder River basins, and have numerous pre-1950 rights going unfulfilled. Although no formal call for regulation within Wyoming has been received on the mainstem Tongue River, that in no way implies that our pre-Compact rights are being met to any significant degree.

For your information, several tributaries in the Tongue and Powder River basins in Wyoming have been in regulation

this entire irrigation season; Big and Little Goose Creeks for instance never had a right junior to 1883 on at all. In the upper Powder River drainage, regulation is to the Sahara Ditch priority and in the Crazy Woman decree area, only one right is getting water. Piney Creek and Lower Clear Creek have been regulated to pre-1950 rights since mid-June and are now regulated back to 1884. Both Sheridan and Buffalo are on municipal rationing to their water customers. And we have entirely emptied several of our smaller mountain reservoirs and several more will be fully drained in the next few weeks.

Your letter purports the Compact to say things that are clearly only Montana's recent interpretation. Montana's interpretation of Article V, as described in the second paragraph of your letter, is quite different from how the commission, including Montana, has operated in the past. As the administration of the Compact was being analyzed by the two states in the 1980's, it was understood that the only water being apportioned was the post-1950 "unused and unappropriated waters of the interstate tributaries . . ." Montana's more recent stance that the pre-1950 rights in Montana must be met by contemporaneous regulation of post-1950 rights in Wyoming is unsubstantiated by the Compact itself or any of its history. As this position is of your own making, Wyoming feels no obligation to change its long held position regarding the administration of the water rights in place as of the date of the Compact. Montana continues to assert as fact an interpretation of the Compact we have taken great exception to for over two years now. An interstate delivery schedule for pre-1950 rights is not now, and never was, a provision of this Compact.

You suggest in your letter that the Technical Committee should be convened to take action related to water storage in the basin. I must admit that I see some irony in Montana's suggestion of the use of the Technical Committee since it has been difficult in the past to get extensive participation by your staff in the operations of that committee. Wyoming has taken the lead in agenda building, taking notes, distribution of information and other logistics associated with the Committee. After your "call" letter in 2004, Wyoming stood ready to host the Technical Committee and share additional information regarding water operations in the Tongue and Powder River basins in Wyoming. We wanted to show you around and see how we truly operate. Montana twice cancelled these meetings after accepting the invitation and having firm dates selected. If you are seeking cooperation from Wyoming, it has been there.

As the Compact makes no provision for the "call" your letter suggests, it appears in our mutual interest to devise an administration system, much like our states worked on in the 1980's, to address the allocation methods described in Article V.C. We sought to get Montana engaged in this process in 2004, to no avail. Had we succeeded, the work product may not be valuable given the situation we find in 2006.

I find your claimed inability to fill Tongue River Reservoir confusing, as records show Montana released excess amounts from the reservoir during the winter months that would have easily provided the necessary water to fill it. Your own website records show that Tongue River Reservoir was filled to 97 percent of capacity as recently as July 9, 2006. The additional 2,000 (+/-) acre feet of water needed to completely fill would have been there had Montana judiciously managed the reservoir. Wyoming

cannot manage the water once it crosses the state line, only Montana can. And, as long as there is water passing the compact points at the mouth of the Tongue (at Miles City) and Power (at Locate) Rivers, there is evidence of water for allocation under the Compact for both our states. Remember, Montana has over three times the storage in the Tongue River basin for less than half the pre-compact acres, as compared to Wyoming. So, the ability to husband Tongue River flows is far greater in Montana than in Wyoming.

I agree that we can do a better job of collecting, analyzing and sharing information among our two states. That's why Wyoming took the initiative to get an appropriation from our Legislature to gather and analyze more information, contingent upon a similar commitment by Montana. This good faith offer for in kind sharing of these resources was discussed at our Commission meeting in April, and was intended to further our objective understanding of the uses on these rivers. It was also intended to keep these Compact discussions science-based among our professional staffs to forestall unnecessarily elevating any compact issues out of sheer lack of understanding. I now question whether Montana is committed to this objective approach.

In sum, Wyoming will not release stored water for the benefit of Montana, as Wyoming believes it has properly stored that water in accordance with Compact provisions. I will also not agree to the convening of a meeting of the Technical Committee until Montana's Compact Commissioner and I can agree on exactly what it is we want them to do. As the State's Commissioners, we have an obligation to give clear direction to the Technical Committee in order for progress to be made on these difficult, complex issues.

If your new Commissioner wishes to meet to discuss what can be done under the Compact, as written, I'll be there.

Jack's pending retirement leaves me concerned about the continuity of representation from Montana. Working through these difficult interstate issues takes a significant commitment of time and effort on the part of all concerned. I am hopeful that Montana will soon name its replacement to the Yellowstone River Compact Commission so that we can return to constructive dialog. I am confident that such a dialog will move us forward in resolving these difficult matters. Please tell Jack that I do wish him the best after his departure from state government in Montana.

Sincerely,

Patrick T. Tyrrell
State Engineer

Cc: Bill Horak, Chairman, Yellowstone River Compact Commission